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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

FLORENCE DOLAN,
Petitioner,

v.

CITY OF TIGARD,
Respondent.

On Writ of Certiorari to the
Supreme Court of Oregon

BRIEF ON THE BICYCLE-PEDESTRIAN PATHWAY
DEDICATION BY THE RAILS-TO-TRAILS
CONSERVANCY, THE LEAGUE OF AMERICAN
BICYCLISTS, THE BICYCLE FEDERATION OF
OREGON, NATIONAL WILDLIFE FEDERATION,
AND THE AMERICAN SOCIETY OF
LANDSCAPE ARCHITECTS
AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTERESTS OF THE AMICI CURIAE

Pursuant to Supreme Court Rule 37, we file this brief *amici curiae* in support of Respondent City of Tigard.*

* Letters reflecting written consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

The Rails-to-Trails Conservancy (RTC) is a nonprofit, public interest organization with a nationwide membership of 50,000, whose mission is to enhance America's communities and countrysides by connecting open space and abandoned railroad corridors into a nationwide network of public trails. RTC works to promote the integration of trails into a community's transportation infrastructure in order to provide critically needed and realistic non-motorized transportation alternatives.

The League of American Bicyclists, founded in 1880 as the League of American Wheelmen, is a national nonprofit membership organization comprised of more than 27,000 bicyclists and 500 affiliated clubs and advocacy organizations. The League works to educate the public about bicycling, and to promote greater recognition of bicycles as a legitimate, environmentally sustainable mode of transportation.

The Bicycle Federation of Oregon is a membership-based nonprofit representing more than 1,500 Oregon citizens, supporting bicycling and walking as viable transportation options for livable communities.

National Wildlife Federation (NWF) is the nation's largest, not-for-profit conservation education organization dedicated to the wise management of the world's natural resources. NWF has endorsed bicycle and pedestrian facilities to alleviate the pollution and traffic problems caused by the single-occupant automobile.

The American Society of Landscape Architects (ASLA) is a national professional society representing over 10,500 landscape architects in the United States and North

America. Founded in 1899 and representing a profession formally dating to the 1860's, ASLA supports the creation of linear systems -- of greenways and trails -- to relieve the stress of congestion on urban populations and to protect the environment and ecological systems.

SUMMARY OF THE ARGUMENT

In this case, a comprehensive and democratic planning process supports a modest transportation dedication sensibly designed to mitigate traffic congestion and air pollution caused by a major commercial redevelopment. These planning judgments, embodied in the City of Tigard's zoning ordinance, required that Petitioner dedicate a small, outlying segment of her 1.67 acre commercial site for use as a bicycle-pedestrian pathway, as a condition of approving her proposal to double the size of her existing store. The record below demonstrates that the modest dedication was necessary, factually supported by a lengthy and open comprehensive planning process, and in full accord with important national, state and local policies.

There is ample support in the unrebutted record below that the modest dedication by easement to Tigard's bicycle-pedestrian pathway system will address the traffic congestion and air pollution that Petitioner's proposed expansion would cause. This dedication is no different from the types of on-site transportation improvements routinely required of other commercial developers. Petitioner will also receive tangible benefits because her business will be more accessible and visible to current and potential customers who use the pathway.

Bicycle-pedestrian pathways have proven their effectiveness in addressing transportation needs of development, while mitigating the harmful impacts of an automobile-dependent transportation system. Their utility and importance have been expressly recognized by Congress in transportation and clean air laws. The need for such transportation facilities is particularly acute for communities such as Tigard, which are located in areas designated under the Clean Air Act as having failed to attain national ambient air quality standards for the hazardous pollutants emitted by motor vehicles.

This modest dedication would mitigate the uncontested traffic and air-quality impacts that Petitioner's redevelopment would impose on Tigard, would provide tangible benefits to Petitioner's business and falls squarely within the mainstream of long-established principles of land use regulation.

STATEMENT OF THE CASE

I. THE BICYCLE-PEDESTRIAN PATHWAY DEDICATION REPRESENTS A MEASURED AND AMPLY SUPPORTED PLANNING DECISION, MODEST IN SCOPE AND RELATED IN KIND TO THE ANTICIPATED ADVERSE IMPACTS OF PETITIONER'S PROPOSED COMMERCIAL REDEVELOPMENT.

Petitioner's store is in the heart of downtown Tigard, on the eastern side of southwest Main Street, just north of one of the intersections of Main Street with Pacific Highway. The 1.67-acre property is bounded on its southwest by Fanno Creek, which winds through downtown. The site is currently occupied by one of Petitioner's chain of electrical and plumbing supply stores, with some 9,720 square feet under roof and a gravel parking lot. *See* Index & R., at 10, *Dolan v. City of Tigard*, LUBA No. 91-161 (Oct. 30, 1991). Petitioner's plans call for doubling the size of her store, paving a parking lot for 39 cars and three bicycles, and reserving the eastern section of the lot for additional future development. *See id.* at 11.

The dedication required of Petitioner for the bicycle-pedestrian pathway was the result of an open, democratic and broad-based comprehensive planning process. The bicycle-pedestrian pathway is an important element of Tigard's response to its transportation and air quality needs. The decision to impose such dedications (or similar ones) on those proposing major commercial redevelopment in the already congested downtown area constitutes a measured and

fully supported allocation of benefit and burden, each of whose factual premises are unrebutted by Petitioner.

A. *Traffic Congestion Caused By Rapid Growth Has Strained Tigard's Transportation Infrastructure And Has Exacerbated Local And Regional Air Pollution.*

Situated on the outskirts of Portland, the City of Tigard has more than quadrupled in population from 1970 to 1989. Tigard Compr. Plan I-142 (1982 as revised July 1993).¹ Tigard's Comprehensive Plan projected that from 1987 to 2000, Tigard's population would double to approximately 40,000 residents. *See id.* at Tigard Park Plan 1 fig. 1 (1987).

Increased commercial and retail activity both accompanied and fueled Tigard's rapid growth. According to the United States Department of Commerce, Tigard's

¹ Tigard's zoning ordinances and comprehensive plan are set forth by reference in the Land Use Board of Appeals (LUBA) Index and Record. Index & R., at iv, *Dolan*, LUBA No. 91-161 (Oct. 30, 1991). This Court, like the Oregon Courts below, may take judicial notice of the relevant zoning ordinances and comprehensive plans. *See* Or. Rev. Stat. § 40.090(7) (authorizing judicial notice of "[a]n ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived therefrom"); *Newcomb v. Brennan*, 558 F.2d 825, 829 (7th Cir.) (city ordinances are proper subjects for judicial notice), *cert. denied*, 434 U.S. 968 (1977); *Ruhs v. Pacific Power & Light*, 671 F.2d 1268, 1273 (10th Cir. 1982) (judicial notice of municipal ordinance permissible where a state statute specifically so provides). *See also* Tigard Community Dev. Code § 18.32.210 (authorizing zoning approval authorities to "take [judicial] notice of . . . [t]he comprehensive plan and other officially adopted plans, implementing ordinances, rules and regulations . . .").

retail store sales totalled \$197 million in 1987, *id.* at I-146, and, in general, have ranked in the top fifteen for all Oregon cities. *Id.* at I-147.

Tigard's increased population and commercial development have seriously strained the City's transportation infrastructure. *See id.* at I-221. Major congestion problems "have resulted from the rapid population growth since 1970." *Id.* at II-54. Main Street, where Petitioner's store is located, is often so congested with cars that emergency response time by fire vehicles is dangerously delayed. *See id.* at II-48. Main Street is designated as a Major Collector, feeding traffic onto and off Pacific Highway, an Arterial. *Id.* at I-226.² As with many of the Major Collectors in Tigard, Main Street, even in 1984, "inadequately service[s] both current and future traffic demands." *Id.* at I-221. It remains so today.

Pacific Highway, the major trafficway through downtown Tigard, which Main Street crosses near Petitioner's establishment, has the highest traffic volumes, congestion and accident rates within the City. *Id.* at I-236 to -245. Traffic counts measuring average daily traffic ("ADT") along Pacific Highway range from 19,400 to 39,500, *id.* at I-236, and actual ADT may be as high as 47,600. *Id.* at I-150. Pacific Highway is considered an unacceptable trafficway, with severe "congestion problems." *Id.* at I-243. Main Street has between 6,700 to 9,600 ADT. *Id.* at I-236. Traffic congestion in Tigard is at its worst in the immediate vicinity of Petitioner's store, at the

² *See* Washington County Compr. Framework Plan: Preliminary Draft at 3.7.3 to .5 (1982) (defining "Major Collector" and "Arterial").

intersection of Pacific Highway and Main Street. *Id.* at I-239 diagram IV.

Tigard's traffic-related congestion has contributed to severe regional air quality problems. *See id.* at I-118, II-22. Tigard is part of the Portland, Oregon-Vancouver, Washington metropolitan area, which has been designated by the United States Environmental Protection Agency as a nonattainment area under the Clean Air Act for carbon monoxide and ozone -- pollutants for which motorized vehicles are the primary source. 40 C.F.R. § 81.338 (1992).³ The major source of air pollution in Tigard is automobile emissions. Tigard Compr. Plan II-22. Sources of such emissions were concentrated on Arterials, and on Major Collectors like Main Street in Tigard's downtown. *See id.*

B. Tigard's Comprehensive Plan And Implementing Ordinance Direct That Traffic Congestion And Traffic-Related Air Quality Problems Be Addressed, In Part, Through Alternate Transportation Systems, Including Pathways For Bicycles And Pedestrians.

The City of Tigard's Comprehensive Plan was developed in 1982 in response to planning mandates from the State of Oregon.⁴ Tigard's planning process, while directly

³ Under the Clean Air Act, a nonattainment area is "any area that does not meet . . . the national primary or secondary ambient air quality standard for the pollutant" 42 U.S.C. § 7407(d).

⁴ *See* Or. Rev. Stat. § 197.175(2)(a) (requiring cities and counties to prepare and adopt comprehensive plans and regulations for land use in (continued...))

responsive to State imperatives, also drew upon extensive local community input through the participation of neighborhood planning organizations, residents, and business owners. A lengthy process of municipal debate and discussion culminated in the City Council's adoption of the Tigard Comprehensive Plan as binding land use policy. Tigard Compr. Plan I-6 to -8. The Plan was codified in provisions of the Community Development Code ("CDC"), including the requirement at issue here. Tigard City Ordinance Nos. 89-06, 83-52 (codified as amended at Tigard Community Dev. Code § 18.01.010 *et seq.*).

The Tigard Comprehensive Plan adopts several linked strategies to address the traffic congestion and air quality problems occasioned by Tigard's explosive growth. An emphasis on "modal shifting" -- the replacement of motor vehicle trips with the use of other types of transportation, including public transit, bicycling, and walking -- is a central feature of the Plan's transportation goals.⁵

⁴(...continued)

accordance with state goals, established by the state Land Conservation and Development Commission. Or. Admin. R. § 660-15-000(12) (specifying that transportation plans "consider all modes of transportation including . . . bicycle and pedestrian [modes]").

⁵ For example, the Plan seeks to route public transit through the City's high population areas in the downtown core. *See* Tigard Compr. Plan I-249 to -256. Linking public transit to high density areas is designed to "contribute to energy savings and less air pollution." *Id.* at I-254. Focusing public transit in the automobile-congested commercial center of the City is also designed to encourage "walking to adjacent commercial outlets (e.g., for groceries)." *Id.*

To facilitate these desirable modal shifts, the Tigard Comprehensive Plan adopted and incorporated Pedestrian-Bicycle Pathway and Parks Master plans. These master plans lay out a new transportation infrastructure consisting of an extensive network of pedestrian and bicycle pathways throughout Tigard. Tigard Compr. Plan at I-266 to -273; City of Tigard Parks Master Plans (1989).

The Pedestrian-Bicycle Pathway Plan was designed, among other criteria, to provide "safe access to schools, recreation areas, and *major shopping areas*." Tigard Compr. Plan I-267 (emphasis added). Construction of the networks is well under way. By the time the Plan was adopted, there were some 40 miles of sidewalks and bicycle-pedestrian pathways in Tigard. See City of Tigard Public Facilities Plan 12, 16. The City has since required numerous other dedicated easements, utilized its own parklands, has spent in excess of \$800,000 on construction costs for the network of bicycle-pedestrian paths, and has planned for the investment of significantly more funds. *Id.*

Tigard's Comprehensive Plan places special emphasis on the downtown area, see Tigard Compr. Plan at I-268, where "[b]icycle and pedestrian pathway systems will result in some reduction of automobile trips within the community." *Id.* at I-221. In Portland, Tigard's hub city, which has a history of strong bicycle use, bicycling "has doubled in volume since 1974, and now accounts for almost 4 percent of all work trips -- more than double the national average." Regional Transp. Plan 1-12 (1992). The Pedestrian-Bicycle Pathway Plan provides for a bicycle and pedestrian pathway along the northern side of Fanno Creek Park, entering south Main Street at Petitioner's property, and linking up with branches reaching south to the Civic Center,

the Senior Center, and elsewhere in the City. See City of Tigard Parks Master Plans 10-11 fig. 2.

Tigard's Comprehensive Plan is implemented through the CDC, which ensures that all land use decisions on new development or major modifications of existing development are consistent with the Plan. The CDC directs the City to require, where appropriate, facilities to accommodate traffic and circulation needs generated by new development, consistent with the policies and goals in Tigard's Comprehensive Plan.

To promote public transit use, development proposals that are adjacent to existing or proposed transit routes are required to dedicate facilities for bus stops shelters, turnouts for buses, and connecting paths to the shelters, where appropriate. Tigard Community Dev. Code § 18.120.180.12. Other development proposals by virtue of their location, must provide "for pedestrianways [including sidewalks] and bicycleways if such facilities are shown on an adopted plan." *Id.* § 18.120.180.11.⁶

C. *During The Site-Development Review Process, Petitioner Did Not Rebut Any Of Tigard's Factual Findings Or Comprehensive Plan Determinations.*

The CDC provides a series of procedural requirements (and opportunities) for a landholder to seek a variance from a required dedication. See Tigard Community

⁶ See also Tigard Community Dev. Code §§ 18.120.180.A.8, 18.164.110.A. The CDC also requires one secure bicycle parking space for every fifteen required automobile spaces. *Id.* § 18.106.020.P.

Dev. Code §§ 18.134.010 to .070. These include the opportunity to demonstrate that circumstances have changed since the adoption of the Tigard Comprehensive Plan; that there are mistakes in the Plan or in the incorporated maps as they relate to a development; or that their application to a particular project would cause an undue or unnecessary hardship. *Id.* §§ 18.32.250.B, 18.134.010.A. An applicant for a variance must submit a traffic analysis of a proposed project. *See id.* § 18.164.030. The burden of proof is on the applicant for a variance, but the CDC provides that an incomplete application will be fully reviewed on the basis of available information. *Id.* § 18.32.060.

When her first redevelopment application was approved with dedication requirements functionally identical to those at suit here, Petitioner appealed to the Oregon Land Use Board of Appeals (LUBA). *Dolan v. City of Tigard*, 20 Or. LUBA 411 (1991). When the LUBA dismissed the appeal as unripe because no variance had been sought below, *id.* at 425-26; Pet. Cert. E-22, Petitioner filed the instant application.

Despite the CDC provisions requiring that a variance application be factually supported, Petitioner submitted only a one-paragraph statement averring that some of the required dedications constituted a "taking." Index & R., at 153, *Dolan*, LUBA No. 91-161. Petitioner has yet to meet the City on the factual merits of the dedication. No evidence has ever been presented by Petitioner to rebut the extensive factual findings of Tigard's Comprehensive Plan; none has been presented: (1) to show that her redeveloped facility will not add to Tigard's dangerous traffic congestion and related air pollution; (2) to challenge the documented planning determination that the bicycle-pedestrian pathway will help

alleviate development-induced traffic congestion and air pollution in the downtown area; or (3) to demonstrate that Petitioner, by virtue of her particular circumstances, would be unduly burdened by the dedication.

II. TIGARD'S DETERMINATION THAT A COMPREHENSIVE BICYCLE-PEDESTRIAN PATHWAY SYSTEM WILL REDUCE VEHICLE CONGESTION AND RESULTING AIR POLLUTION IS SUPPORTED BY FEDERAL TRANSPORTATION AND AIR QUALITY POLICIES AS WELL AS BY TRAFFIC ENGINEERING STUDIES.

The City of Tigard's determination that a bicycle-pedestrian pathway would address the traffic and air quality impacts of increased commercial development on the City's already congested Main Street is fully in accord with current traffic engineering studies. The effectiveness of bicycle-pedestrian pathway systems, like Tigard's, which are comprehensively planned and integrated into a community's overall transportation system, is well established. These transportation systems have also been explicitly endorsed by federal transportation and air quality policies, which now mandate the inclusion of bicycle-pedestrian facilities in state transportation planning. Most states rely, in part, on such facilities to meet their responsibilities for pollution control under the Clean Air Act.

A. *Studies Directly Link The Existence Of Pedestrian-Bicycle Pathways To Reduction In Motor Vehicle Use And Improved Air Quality -- "If You Build It They Will Come."*

"Travel demand management" studies confirm the reasonableness of Tigard's measured planning judgment to foster modal shifting in order to accommodate growth and new development.⁷ The existence of a well-planned system of bicycle-pedestrian pathways will reduce motor vehicle trips and motor vehicle miles travelled. It is precisely such a system that Tigard has chosen to develop.

Almost 55 million Americans rode a bicycle in 1991, 31 million of whom did so regularly.⁸ Bicycling is, on average, faster than driving a car or riding a bus for trips under three miles.⁹ Over 60 percent of all automobile trips in the U.S. were five miles or less, accounting for 16 percent

⁷ Travel Demand Management ("TDM") is designed "to alleviate traffic problems through improved management of vehicle trip demand." Federal Highway Admin., U.S. Dep't of Transp., Rep. No. FHWA-SA-9-0-005, *Evaluation of Travel Demand Management Measures to Relieve Congestion 1* (1990) [hereinafter *FHWA Evaluation of Travel Demand*]. It includes strategies such as transit, carpooling and provisions for walking and bicycling. *Id.* at 1-2.

⁸ Bicycle Inst. of Am., *Bicycling Reference Book 4* (1993-94).

⁹ See Michael Everett, *Commuter Demand for Bicycle Transportation in the United States*, 28 *Traffic Q.* 585, 585 (1974).

of all vehicle miles travelled.¹⁰ Bicycling and walking are particularly practical for short trips.¹¹

Where facilities for cyclists and pedestrians are provided, use will rise. According to a Congressionally-mandated study, "cities with higher levels of bicycle commuting have on average 70% more bikeways per roadway mile and six times more bike lanes per arterial mile" Federal Highway Admin., U.S. Dep't of Transp., Pub. No. FHWA-PD-92-041, *National Bicycling and Walking Study Case Study No. 1: Reasons Why Bicycling and Walking Are and Are Not Being Used More Extensively As Travel Modes 1* (1992) [hereinafter *FHWA Case Study No. 1*].¹² A recent study in nearby Portland, Oregon found that the "friendlier" the environment was to pedestrians (and bicyclists) the more people walked (and used bicycles).¹³ Conversely, the absence of appropriate transportation

¹⁰ U.S. Env'tl Protection Agency, EPA-400/2-79-001, *Bicycling and Air Quality Information Document 15* (1979) [hereinafter *Bicycling and Air Quality*].

¹¹ See Everett, *supra* at 600.

¹² The National Bicycling and Walking Study was commissioned by Congress in 1990 to assist the U.S. Department of Transportation in implementing national policy to accommodate bicycle and pedestrian needs in transportation planning and design. See H.R. Conf. Rep. No. 892, 101st Cong., 2d Sess. 25 (Oct. 16, 1990); H.R. Rep. No. 584, 101st Cong., 2d Sess. 75 (July 10, 1990).

¹³ 1000 Friends of Oregon, 4A *The Pedestrian Environment* 3, 5, 17 tbl. 2, 18 fig. 4 (1993). Vehicle miles travelled and vehicle trips per household declined dramatically in the more pedestrian friendly environment. *Id.* at 25 tbl. 6, 26.

infrastructure is the greatest deterrent to utilitarian walking and bicycling.¹⁴

Providing a comprehensive bicycle-pedestrian system, including on and off-road accommodations that are integrated into the community's overall transportation and land use plan is demonstrably effective in encouraging bicycling or walking as a substitute for automobile trips. A 1986 study found that 7,000 commuters (14,000 during peak summer months) in the Chicago region bicycle to work every day, most of whom live near one of the five linear trails in the region.¹⁵ In census zones with trails, an average of 15.6 percent of commuter trips are made by bicycle, compared to 1 percent for the region as a whole. *Resource Book, supra* at 6-6. Moreover, a Portland, Oregon study showed that in excess of 10 percent of bicycling in the center city was for shopping. City of Portland, Oregon, Bureau of Traffic Mgmt., *Bicycle Transportation Study: Central City Transportation Management Plan* 36 fig. 9 (1993). Likewise in Gresham, which, like Tigard, is located in the Portland Metropolitan Area, between 10 to 17 percent of residents did some shopping and errands by bicycle. Gilmore Research Group, *Gresham Transportation Choices Survey* 39 tbl. 13 (1993). Safe routes that provide linkages with shopping

¹⁴ See FHWA Evaluation of Travel Demand, *supra* at 28 ("If travelers are presented with no alternative that realistically competes with the private auto, they will not stop driving.").

¹⁵ See Rivers & Trails Conserv. Assistance, National Park Serv., *Economic Impacts of Protecting Rivers, Trails and Greenway Corridors: A Resource Book* 6-6 (1989), citing David M. Eubanks, *From Abandoned Railways to Recreation Trails: Measurement of Community Impact*, Public Aff. 262 & 263 (1986) [hereinafter *Resource Book*].

areas and other key destinations persuade people to walk or bicycle rather than drive short distances. Utilitarian bicycling increases if bicycle-pedestrian facilities provide access comparable to that enjoyed by motorists. See FHWA Case Study No. 1, *supra* at 3.

The United States Department of Transportation recognizes as a matter of policy that increased motor vehicle traffic makes bicycling less safe and desirable, and that this should be alleviated by providing a higher degree of segregation between motorized vehicles and bicycles. See Federal Highway Admin., U.S. Dep't of Transp., Pub. No. FHWA-RD-92-073, *Selecting Roadway Design Treatments to Accommodate Bicycles* 14 (1994). Bicycle accident data consistently shows the hazards of intersections, and retail entrances and exits, to bicyclists. *Id.*; see John Forester, *Bicycle Transportation* 49-98 (1983). At the simplest level, Tigard is committed to improving conditions for bicyclists in the City, and the proposed retail expansion has the opposite effect. It is therefore appropriate to require a bicycle-pedestrian pathway exaction to alleviate this harm.

Bicycling and walking do not cause air pollution. Thus, "every bicycle [or walking] trip substitutes for auto travel [and] results in cleaner air." *Bicycling and Air Quality, supra* at xi. Because ambient concentrations of carbon monoxide (CO) are directly proportional to emissions, a five percent reduction in emissions would reduce ambient CO concentrations by five percent. *Id.* at 74. Moreover, bicycle and pedestrian trips substitute for short automobile trips, which create the most pollution since cold engines do not fire efficiently; "90 percent of . . . emissions occur in the first mile." Federal Highway Admin., U.S. Dep't of Transp., Pub. No. FHWA-PD-93-012, *National Bicycling*

and Walking Study Case Study No. 9: Linking Bicycle/Pedestrian Facilities with Transit 84 (1993).

Accordingly, even a modest shift to bicycle or pedestrian trips yields disproportionate benefits in improved air quality.

These studies collectively support the City of Tigard's planning judgment that, given the traffic volumes on both Main Street and Pacific Highway (the Collector Street and Arterial directly serving Petitioner's store), an off-road pathway is necessary to allow customers and employees to walk or bicycle rather than drive to Petitioner's store. These studies also demonstrate that this pathway system will result in a modal shift that will accomplish the City's dual objective of relieving traffic congestion and improving air quality.

B. Federal Clean Air And Transportation Laws Recognize That Bicycle-Pedestrian Facilities Reduce Traffic Congestion And Improve Air Quality.

Federal air quality policies and transportation planning requirements unambiguously and directly support Tigard's determination that a bicycle-pedestrian pathway system would alleviate the traffic and air quality impacts of increased commercial development on the already congested Main Street. These policies recognize the close relationship between achieving federal air quality standards and modal shifting, and require that air quality be taken into account in transportation planning.

1. The Clean Air Act Specifically Endorses Bicycle-Pedestrian Transportation Strategies As Effective Means Of Attaining Federal Air Quality Standards.

The Clean Air Act establishes national ambient air quality standards; states not meeting these standards must comply with federally approved comprehensive State Implementation Plans ("SIPs") which enumerate strategies that will attain national air quality standards by a statutory deadline. 42 U.S.C. §§ 7401 *et seq.* The Clean Air Act explicitly recommends bicycle and pedestrian facilities as a "transportation control measure" for attaining national ambient air quality standards for ozone, carbon monoxide (CO) and particulate matter -- the pollutants for which motorized vehicles are a primary source. *Id.* § 7408(f).

The City of Tigard is in the Portland-Vancouver Interstate Air Quality Maintenance Area ("AMQA") which is nonattainment for both ozone and carbon monoxide and, thus, is subject to the Clean Air Act's directive to reduce pollution from mobile sources. 40 C.F.R. § 81.338 (1992). Transportation plans and programs in Tigard must conform to the nonattainment area's air quality implementation plans, 42 U.S.C. § 7506(c), and contribute to annual reductions of those pollutants. *Id.*; see 58 Fed. Reg. 62188 (1993).

Thirty-three states, including Oregon, have incorporated bicycle-pedestrian strategies as a reasonably achievable transportation control measure. League of American Wheelmen, *How to Promote Bicycling as an Air Pollution Solution* 3 (1989). The Oregon SIP for ozone in the Portland-Vancouver Interstate AQMA identified bicycling strategies as a high priority "transportation control measure"

for reducing hydrocarbon emissions -- an ozone precursor.¹⁶ The SIP determined that, with attitudinal changes, between 14,000 and 44,000 work trips could be made daily by bicycle in 1987, reducing hydrocarbon emissions from 100 to 500 kilograms/day. *Portland-Vancouver Control Strategy*, supra at 31. Moreover, if seven percent of nonwork trips, such as shopping, were made by bicycle, there would be an additional emission reduction of 540 kilograms/day. *Id.* at 32.

2. *Federal Transportation Laws Require Consideration Of Alternative Transportation Modes, Including Bicycle-Pedestrian Strategies, In Order To Reduce Congestion And Conform With Federal Air Quality Directives.*

Likewise, the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA"),¹⁷ unequivocally committed the federal government to the proposition, long embraced by the City of Tigard, that "[i]t is in the national interest to encourage and promote the development of transportation systems embracing various modes of transportation in a manner which will . . . minimize transportation-related fuel consumption and air pollution."

¹⁶ See Metropolitan Serv. Dist., Oregon Dep't of Env'tl Quality, *Control Strategy for Portland-Vancouver Interstate Air Quality Maintenance Area (AMQA) (Oregon Portion) State Implementation Plan Revision for Ozone* § 4.3, at 31-32 (1982) [hereinafter *Portland-Vancouver Control Strategy*].

¹⁷ Pub. L. No. 102-240, 105 Stat. 1914 (codified as amended in sections of 23 and 49 U.S.C. and scattered sections of other titles of the U.S.C.).

23 U.S.C. § 134(a). Consistent with this principle, the Federal Highway Administration has determined that "[i]t is Federal transportation policy to . . . [p]romote increased use of bicycling, and encourage planners and engineers to accommodate bicycle and pedestrian needs in designing transportation facilities for urban and suburban areas." U.S. Dep't of Transp., *Moving America: New Directions, New Opportunities*, Feb. 1990, at 100.

ISTEA was enacted to promote development of a transportation system encompassing a variety of modes. 49 U.S.C. § 302. To implement this, ISTEA requires transportation planning organizations ("metropolitan planning organization" as defined under 49 App. U.S.C. § 1607(b)) to develop long-range transportation plans that include consideration of pedestrian walkways and bicycle transportation facilities, and requires states to include such facilities in statewide plans, as a condition of receiving federal transportation funding. 23 U.S.C. §§ 134(a), 135(a), (c).

Federal transportation laws also require transportation planners to conform their decisions to state and metropolitan air quality goals. *Id.* § 135(b). Metropolitan planning organizations in areas that have not attained national air quality standards for carbon monoxide and ozone must coordinate the development of their long-range transportation plans with transportation control measures adopted by the SIPs. 23 U.S.C. § 134(g)(3); 49 App. U.S.C. § 1607(g)(3). Because Tigard is within such an area, no federal funds may be made available to highway projects that will result in a significant increase in carrying capacity for single occupant vehicles, except in certain approved circumstances. 23 U.S.C. § 134(l).

III. THE TRANSPORTATION DEDICATION IS FULLY IN ACCORD WITH THE DECISIONS OF THIS COURT, AND FAIRLY ALLOCATES BENEFITS AND BURDENS.

Seventy-five years of planning law support the authority of local governments to condition new development approvals upon use restrictions, the payment of exactions and the furnishing of dedications to address the transportation needs, or mitigate the adverse public effects reasonably to be expected from the proposed developments.¹⁸ See, e.g., *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834-36 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491-92 (1987); *City of Memphis v. Greene*, 451 U.S. 100, 126-29 (1981); *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395-97 (1926). Because *Nollan*, however broadly read, is met on this record, the decision below should be affirmed.

Petitioner argues that, under *Nollan*, the bicycle-pedestrian dedication is a taking because the City cannot establish specific evidence that the bicycle-pedestrian path will address the traffic impacts of her new facility. See Pet'r Br. at 16-17. Even if this were a fair and accurate reading of *Nollan*, which it is not, the City's years of planning work and studies here have surely met that burden. The vehicular

¹⁸ For instance, the Standard Planning Enabling Act, U.S. Dep't of Commerce, *A Standard City Planning Enabling Act by the Advisory Committee on City Planning and Zoning Appointed by Secretary Hoover* (1928), widely adopted throughout the United States, provided for the conditioning of subdivision plat approval on dedications and exactions to provide streets, water mains, sewer lines and other utilities.

traffic impacts of additional downtown development have been documented for more than a decade. See Tigard Compr. Plan I-236 to -240. These transportation impacts could hardly be disputed by Petitioner, since the success of her store and ultimately her redevelopment investment rests on an expectation of increased customer traffic.¹⁹ In similar fashion, the utility of a mode-shifting dedication to address this anticipated traffic congestion is amply supported both by the comprehensive planning process in Tigard itself (see discussion *supra*, part II.A.) and by State and national policy imperatives. *Id.* at parts I, II.B, *supra*.

Petitioner suggests that the ordinance requiring dedication for a bicycle-pedestrian pathway system unfairly burdens riparian landowners with the full costs of this public improvement. Pet'r Br. at 14. Under Tigard's Comprehensive Plan, however, the burdens are shared by all developers, riparian and nonriparian alike. Each new development must accommodate transportation needs set forth in the plan in a manner appropriate to the location and nature of the development. Such burdens include dedications and exactions for sidewalks, bus turnouts, bus shelters and other measures to accommodate access to public transit where appropriate. Tigard Community Dev. Code §§ 18.164.070, 18.120.180.12. None of these were required of Petitioner. Because her expansion falls within the planned bicycle-pedestrian pathway, the City has determined that a modest dedication to create a segment of that pathway is an

¹⁹ The record also provides evidence of the mathematical formula which the City used to assess the traffic impact of the new development. See Index & R., at 14, *Dolan*, LUBA No. 91-161.

appropriate transportation improvement to address the undisputed traffic impacts of Petitioner's enlarged store.²⁰

Such dedication requirements fall squarely within long-established traditions of land use law. As Justices Scalia and O'Connor recently observed, "the common zoning regulations requiring subdividers to observe lot-size and set-back restrictions, and to *dedicate certain areas to public streets*, are in accord with our constitutional traditions *because the proposed property use would otherwise be the cause of excessive congestion.*" *Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part) (emphasis added).

Finally, Petitioner is likely to receive tangible benefits from the bicycle-pedestrian pathway system. As the Tigard Area Comprehensive Pedestrian-Bicycle Path and Tigard Parks Master plans make clear, the pathways were created in part to provide bicycle-pedestrian access to downtown commercial retail establishments. Tigard Compr. Plan I-267; City of Tigard Parks Master Plans 6.

The dedication will provide a competitive advantage to Petitioner by increasing both access to and visibility of her store by users of the pathway. This heightened exposure will increase the likelihood that users of the pathway will return

²⁰ Petitioner's claim that her customers will not use a bicycle-pedestrian facility is not supported by the record. In fact, nothing in the record suggests that, like most electrical and plumbing retail stores, Petitioner's store does not carry a wide range of items ranging in size, weight and price. Moreover, Petitioner's redevelopment proposal anticipates additional commercial uses, which need not involve bulky items. See Index & R., at 11, *Dolan*, LUBA No. 91-161.

to shop (on foot, by bicycle or by motor vehicle) at Petitioner's store. There is good reason to believe that the bicycle parking spots will be used. Independent studies confirm that well designed and planned bikeways enhance the value of adjoining real estate, and can be a significant stimulus to the local economy.²¹

In any event, as this Court has held, it is not necessary to show with mathematical precision the balancing of impact and burden, and that the impacts of the development are "precisely calibrated to the use that a party makes of Government services." *United States v. Sperry Corp.*, 493 U.S. 52, 60 (1990). To the contrary, "[l]egislation designed to promote the general welfare commonly burdens some more than others." *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 133 (1978). So long as there is an average reciprocity of benefits and burdens that result from the exaction, the courts will not be required "to calculate whether a specific individual has suffered burdens . . . in excess of the benefits received in determining whether a 'taking' has occurred." *Sperry Corp.*,

²¹ See, e.g., Brian Puncochar & Peter Lagerwey, *Evaluation of the Burke-Gilman Trail's Effect on Property Values and Crime* 2 (1987) (pathways increase the value of adjoining properties); National Park Serv., U.S. Dep't of the Interior, *The Impacts of Rail-Trails: A Study of Users and Nearby Property Owners from Three Trails* 11 (1991) (total annual economic impact for each of three bicycle trails studied was a net gain of \$1.2 million per trail).

493 U.S. at 61 n.7 (quoting *Keystone Bituminous Coal Ass'n*, 480 U.S. at 491 n.21).²²

In short, the City of Tigard has complied with *Nollan*. Petitioner's refusal to contest such issues on the factual merits below implicitly concedes as much. This Court, we respectfully submit, should so hold and affirm.

²² Many post-*Nollan* cases confirm this. See, e.g., *Commercial Builders v. Sacramento*, 941 F.2d 872, 875 (9th Cir. 1991), cert. denied, 112 S. Ct. 1997 (1992) ("*Nollan* does not stand for the proposition that an exaction ordinance will be upheld only where it can be shown that the development is directly responsible for the social ill in question"); *Department of Transp. v. Lundberg*, 825 P.2d 641, 647 (Or.), cert. denied, 113 S. Ct. 467 (1992) (sidewalk dedication requirement serves the same legitimate governmental purpose that would justify denying permits to develop commercially zoned properties).

CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court affirm the decision of the Supreme Court of Oregon below.

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